Status Offenders and Juvenile Court: A Proposal for Revamping Jurisdiction

Though the juvenile court is a relative newcomer to the American legal system, the law's concern about misbehaving children is not.[1] As early as the Revolution, states allowed children to be imprisoned[2] and occasionally executed[3] in the name of the public order. Though much has changed since then, juvenile jurisprudence is still far from settled, and the place of the status offender is perhaps the most unsettled.

Part of the problem stems from the nature of "crimes" encompassed by the juvenile system, that is, status offenses and delinquency. A "status offense" is commonly understood to be an act that can be committed only by a child, such as truancy, running away from home, or disobedience to parents.[4] Delinquency, on the other hand, contains an offense which would be a crime if it were committed by an adult.[5] For years juvenile courts treated the two kinds of offenders in the same way, and many courts still do.

Largely in response to this, the Joint Institute of Judicial Administration/American Bar Association Juvenile Justice Standards Commission proposed that status offense jurisdiction be eliminated,[6] something that only one state previously had done.[7] Although the ABA House of Delegates refused to ac-

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1. Garlock, *"Wayward" Children and the Law, 1820–1900: The Genesis of the Status Offense Jurisdiction of the Juvenile Court*, 13 GA. L. REV. 341 (1979).

2. *See* K. WOODEN, WEEPING IN THE PLAYTIME OF OTHERS—AMERICA'S INCARCERATED CHILDREN 24 (1976).

3. State v. Guild, 10 N.J.L. 163 (1828) (affirmed a death sentence imposed on a twelve year old boy for murder).

4. OHIO REV. CODE ANN. § 2151.022 (Page 1976) defines an "unruly child" (Ohio's term for a status offender) as a child

> (A) Who does not subject himself to the reasonable control of his parents, teachers, guardian, or custodian, by reason of being wayward or habitually disobedient;
> (B) Who is a habitual truant from home or school;
> (C) Who so deports himself as to injure or endanger the health or morals of himself or others;
> (D) Who attempts to enter the marriage relationship in any state without the consent of his parents . . .;
> (E) Who is found in a disreputable place, visits or patronizes a place prohibited by law, or associates with vagrant, vicious, criminal, notorious, or immoral persons;
> (F) Who engages in an occupation prohibited by law, or is in a situation dangerous to life or limb or injurious to the health or morals of himself or others;
> (G) Who has violated any law applicable only to a child.

5. OHIO REV. CODE ANN. § 2151.02 (Page 1976) defines a delinquent child as a child "(A) Who violates any law of this state . . . , which would be a crime if committed by an adult . . . ; [or] (B) Who violates any lawful order of the court made under this chapter."

6. INSTITUTE OF JUDICAL ADMINISTRATION/AMERICAN BAR ASSOCIATION JUVENILE JUSTICE STANDARDS PROJECT, STANDARDS RELATING TO NONCRIMINAL MISBEHAVIOR § 1.1 (Tentative Draft 1977) [hereinafter cited as STANDARDS].

7. Juvenile courts in Utah have jurisdiction over delinquent offenders, neglected and dependent children, truants from school, and children in the state industrial school. UTAH CODE ANN. § 9A:78-3a-16 (1977). A disobedient child, or one who has run away from home, will be referred to juvenile court only after the "earnest and persistent efforts" of the division of family services prove unavailing. *Id.* § 9A:78-3a-16.5. This change was made in 1977. 1977 UTAH LAWS 320. *See* State v. Dung Hung Vo, 585 P.2d 464 (Utah 1978).

cept the proposal,[8] the issues raised by the critics of status offense jurisdiction burn as brightly as ever.

The elimination of status offense jurisdiction from the juvenile courts is undoubtedly too radical a step for most state legislatures, and it may do more harm than good. Retaining the present system, however, ignores the inequities inherent in it. This Comment addresses the problems raised by those favoring abolition of the status offense jurisdiction,[9] discusses two proposals for change,[10] and offers a new proposal for revamping the jurisdiction of the juvenile court.[11]

I. THE PROBLEMS

Among the many complaints about the juvenile justice system, several problems seem especially detrimental to its effectiveness. First, the system shows a marked philosophical contradiction in its legal development. Second, the status offender exists in a sort of constitutional limbo that often provides only uncertain protection from state action. Finally, the juvenile system implies distinctions about delinquents and status offenders that are neither empirically supported nor legally consistent. Together, these criticisms present a strong indictment of the present juvenile jurisdiction statutes.

A. *The Schizophrenic Philosophy of the Juvenile Court*

Juvenile courts were established to keep children out of adult criminal courts.[12] Thus, juvenile courts developed without the retributive features of criminal court; the goal was to treat and cure the anti-social attitude of the child[13] and otherwise act in his or her best interest. The equitable doctrine of *parens patriae*[14] was used to enforce this condition-related, as opposed to behavior-related, philosophy.

The practical application of these principles led to the development of the peculiar style of the juvenile court, a style that changed little until the 1960s. The "proper" procedure for the turn-of-the-century juvenile court was described in this way:

> The child who must be brought into court should, of course, be made to know that he is face to face with the power of the state, but he should at the same time, and more emphatically, be made to feel that he is the object of its care and

8. CRIM. JUST. NEWSLETTER, Feb. 18, 1980, at 4, col. 2. The vote was 145 to 142. *Id.*

9. *See* text accompanying notes 12–96 *infra*.

10. *See* text accompanying notes 97–111 *infra*.

11. *See* text accompanying notes 112–14 *infra*.

12. See Garlock, *"Wayward" Children and the Law, 1820–1900: The Genesis of the Status Offense Jurisdiction of the Juvenile Court*, 13 GA. L. REV. 341 (1979), for a thorough and fascinating history of the legal treatment of juvenile offenders before the advent of juvenile courts.

13. This concept of "medical diagnosis and treatment" is unique to the juvenile court. F. FAUST & P. BRANTINGHAM, JUVENILE JUSTICE PHILOSOPHY: READINGS, CASES, AND COMMENTS 3 (1979).

14. *Parens patriae* allows a chancery court to declare a child a ward of the state if the parents were unable or unwilling to act in the best interests of the child. S. DAVIS, RIGHTS OF JUVENILES: THE JUVENILE JUSTICE SYSTEM § 1.2 (2d ed. 1980).

solicitude. The ordinary trappings of the court-room are out of place in such hearings. The judge on a bench, looking down upon the boy standing at the bar, can never evoke a proper sympathetic spirit. Seated at a desk, with the child at his side, where he can on occasion put his arm around his shoulder and draw the lad to him, the judge, while losing none of his judicial dignity, will gain immensely in the effectiveness of his work.[15]

As the juvenile system developed through the 20th century, the fissures and faults so neatly smoothed over by this optimistic view of the treatment of juvenile offenders opened and swallowed the ideals of its founders. Why the system went wrong was succinctly stated by William O. Douglas:

First, municipal budgets were not equal to the task of enticing experts to work in the field in large numbers. Second, such experts as we had, notably the psychiatrists and analysts, were drawn to the flesh pots receiving handsome fees for rehabilitating the rich. Third, the love and tenderness possessed by the white-coated judge and attendants were not sufficient to untangle the web of subconcious influences that possessed the troubled youngster. Fourth, correctional institutions that were designed to care for these delinquents often became miniature prisons with many of the same vicious aspects. Fifth, the secrecy of juvenile proceedings led to much overreaching and arbitrary actions. Absolute power is a heady thing even when bestowed on men of good intentions.[16]

Recognizing this, the United States Supreme Court began a re-evaluation of the juvenile system. Beginning with *Haley v. Ohio*[17] and culminating with *In re Gault*,[18] the Court selectively recognized a variety of due process rights

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15. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 120 (1909). Little had changed by the 1940s. In describing the operation of his court, Judge Gustav Schramm wrote:

> Court sessions begin without formality. . . .
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> If an attorney represents the child and his family, he is invited to enter. . . . Others with a professional or objective interest—teacher, school principal, police officer, social worker, clergyman—enter to offer what they have to the conduct of the case. . . .
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> When this stage has been concluded, I usually desire to talk with the child himself. I leave the group to enter a small room adjacent to that in which the hearing is being conducted. . . . At the outset we shake hands and sit down together. . . . Encouraging him to talk about himself, I try to direct attention not only to what is specifically wrong, but to the whole story. . . . This approach I believe is the most effective in securing the truth, the whole truth, and nothing but the truth.

Schramm, *The Judge Meets the Boy and His Family*, SOCIAL CORRECTIVES FOR DELINQUENCY—1945 YEARBOOK, NATIONAL PROBATION ASSOCIATION 186–88, *cited in* Rubin, *The Juvenile Court's Search for Identity and Responsibility*, 23 CRIME & DELINQUENCY 1, 3 (1977).

16. Douglas, *Juvenile Courts and Due Process of Law*, 19 JUV. COURT JUDGES' J. 9, 11 (1968).

17. 332 U.S. 596 (1948).

18. 387 U.S. 1 (1967). *Haley* involved a 15-year old boy whose conviction for murder was based on a confession elicited after a five-hour interrogation. The Court said, "The age of the petitioner, the hours when he was grilled, the duration of his quizzing, the fact that he had no friend or counsel to advise him, the callous attitude of the police toward his rights combine to convince us that this was a confession wrung from a child by means that the law should not sanction." 332 U.S. 596, 600–01 (1948) (Douglas, J.) (plurality opinion).

Relying on *Haley*, the Court in Gallegos v. Colorado, 370 U.S. 49 (1962) struck down the conviction for murder handed down by a criminal court to a 14-year old boy who had been detained and interrogated for five days without allowing his mother or counsel to visit him. In holding his confession inadmissable, the Court said, "To allow this conviction to stand would, in effect, be to treat him as if he had no constitutional rights." *Id.* at 54-55.

Kent v. United States, 383 U.S. 541 (1966), was the first case in which the Court addressed the procedures of the juvenile court itself. The Court held that a hearing for bindover to criminal court must at least follow the essentials of due process and fair treatment. *Id.* at 562.

The Court elaborated further on the "essentials" of due process in *Gault* by providing a laundry list of due

to be observed in delinquency proceedings and in proceedings of juveniles tried as adults.

In these cases, however, the Court did not address the problems of status offenders, leaving broad questions unresolved. This lack of review was compounded further by changes in state law that separated status offenders and delinquents within the juvenile system.[19] Arguably, the Court's extension of rights to delinquents did not apply similarly to status offenders. *Gault,* for example, was confined by its language to delinquency proceedings.[20] Thus, the implications of *Gault* and its progeny are unclear in states that statutorily separate delinquency and status offenses.

Added to this confusion was the wide difference of judicial views reflected most clearly in the *Gault* decision. Justices Black[21] and Stewart[22] outlined the divergence of opinion concerning the efficacy of the juvenile system. Black, in his concurrence, stated:

> The juvenile court planners envisaged a system that would practically immunize juveniles from "punishment" for "crimes" in an effort to save them from youthful indiscretions and stigmas due to criminal charges or convictions. I agree with the Court, however, that this exalted ideal had failed of achievement since the beginning of the system.[23]

Justice Black advocated the effective elimination of the juvenile system by imposing full Bill of Rights criminal safeguards instead of utilizing the due process "fundamental fairness" standard adopted by the majority.[24]

Conversely, Justice Stewart, in his dissent, refused to concede that the juvenile system was a failure and held to the classic philosophy of the juvenile court:

> Juvenile proceedings are not criminal trials. They are not civil trials. They simply are not adversary proceedings. Whether treating with a delinquent child, a neglected child, a defective child, or a dependent child, a juvenile proceeding's whole purpose and mission is the very opposite of the mission and purpose of a prosecution in a criminal court. The object of one is the correction of a condition. The object of the other is conviction and punishment for a criminal act.[25]

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process rights applied to juvenile hearings: written notice of charges provided sufficiently in advance of the hearing to allow for preparation; notification to parent and child of the right to retain counsel or to have one appointed; the fifth amendment privilege against self-incrimination; and an opportunity to cross-examine. 387 U.S. 1, 12–57 (1967).

19. Until the early 1960s, status offenders and delinquents were lumped together in every state juvenile system. K. WOODEN, WEEPING IN THE PLAYTIME OF OTHERS—AMERICA'S INCARCERATED CHILDREN 37 (1976). The California statute is one example of the division now made between the types of "offenses." CAL. WELF. & INST. CODE §§ 601–602 (West Supp. 1981). Most states have adopted this approach. STANDARDS *supra* note 6, at 74–83. *But see* note 7 *supra.*

20. 387 U.S. 1, 30–31 (1967).

21. *Id.* at 59 (Black, J., concurring).

22. *Id.* at 78 (Stewart, J., dissenting).

23. *Id.* at 60.

24. *Id.* at 61.

25. *Id.* at 78–79.

Justice Stewart feared that turning delinquency proceedings into criminal trials might result in a return of capital punishment for children.[26] Justice Black, on the other hand, was appalled by the fact that a child could be "sentenced" to "what is in all but name a penitentiary" without the benefit of the constitutional rights usually accorded criminals.[27]

Since *Gault* the Court has weaved an erratic path. It has incorporated the "beyond a reasonable doubt" standard of proof[28] and the fifth amendment double jeopardy clause[29] into delinquency proceedings but refused to require jury trials for delinquents.[30] This restructuring has left status offenders caught in the middle. Juvenile court is now a quasi-criminal court, but status offenders have committed no criminal offense. Instead, the status offender needs rehabilitation. But the juvenile system is accused of being incapable of treating and curing juvenile offenders.[31] The result is a philosophically noncriminal, treatment-oriented system that views (and procedurally, at least, protects) the status offender as a criminal. Reconciling this dilemma is the post-*Gault* juvenile court's most formidable task.

B. *The Undefined Scope of Status Offenders' Constitutional Rights*

1. *Right to Counsel*

Since juvenile proceedings are noncriminal, the sixth amendment requirement of assistance of counsel does not apply.[32] In *Kent v. United States*,[33] however, the United States Supreme Court implied that the fourteenth amendment right to due process required the assistance of counsel in delinquency hearings, and in *Gault* the Court mandated that counsel be available whenever proceedings commence that "may result in commitment to an institution in which the juvenile's freedom is curtailed."[34] Relying on this limitation, some courts have found that a status offender who under state law may not be confined is not entitled to counsel, although probation or other sanctions may be imposed.[35]

Even if counsel is permitted, the value of the right may be minimal. The Supreme Court has long held that the right is meaningless unless counsel is effective.[36] Attorneys in juvenile court, however, are faced with great ob-

26. *Id.* at 79–80.
27. *Id.* at 61.
28. *In re* Winship, 397 U.S. 358 (1970).
29. Breed v. Jones, 421 U.S. 519 (1975). *See also* Swisher v. Brady, 438 U.S. 204 (1978), for a further elaboration of double jeopardy rights in juvenile proceedings.
30. McKeiver v. Pennsylvania, 403 U.S. 528 (1971).
31. *See, e.g.*, Ketcham, *Why Jurisdiction Over Status Offenders Should be Eliminated From Juvenile Courts*, 57 B.U.L. REV. 645, 650–56 (1977); STANDARDS, *supra* note 6, at 3–4.
32. *See, e.g.*, Cope v. Campbell, 175 Ohio St. 475, 196 N.E.2d 457 (1964), in which the conviction and sentencing to the Ohio state reformatory of a 17-year old boy, at an *ex parte* hearing, was affirmed by the Ohio Supreme Court in a pre-*Gault* case.
33. 383 U.S. 541, 557 (1966).
34. 387 U.S. 1, 41 (1967).
35. *See, e.g., In re* Walker, 282 N.C. 28, 191 S.E.2d 702 (1972).
36. Powell v. Alabama, 287 U.S. 45, 71 (1932).

stacles to their effectiveness. The attorney–client privilege must be tailored to provide effective protection when the child is the accused but the parents pay the bill, and the canon seven[37] requirement of zealous representation must be reconciled with the desire of the court to protect the "best interests of the child."[38] The vague nature of status offense laws presents additional problems for an attorney: "[J]udicial history does not record that anyone ever beat [a charge of being] in danger of leading an idle, dissolute, lewd or immoral life."[39] The traditional standard for gauging the effectiveness of counsel is that the representation must not have been so incompetent that the proceeding becomes a farce, sham, or a mockery of justice.[40] Although many courts employ higher standards,[41] an attorney representing a status offender is so hindered that his or her performance often will not reach even this low, amorphous standard. In status offense cases the right to counsel often operates in a procedural sense only, because there is little of a substantive nature that an attorney can do.

2. *Vagueness*

Many status offense laws are intentionally vague; to establish jurisdiction over those children most in need of treatment the laws purposely refrain from specifying the proscribed conduct.[42] They should be, therefore, particularly vulnerable to due process vagueness attacks. To pass constitutional muster, a statute must not be so indefinite that people "of common intelligence must necessarily guess as to its meaning and differ as to its application."[43] An unreasonably vague statute violates due process in that it fails to give fair warning of the conduct proscribed[44] and gives law enforcers too much latitude.[45] While vagueness is a defense most often raised in the criminal area, vagueness principles also apply to civil laws.[46] Therefore, it is irrelevant

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37. ABA CODE OF PROFESSIONAL RESPONSIBILITY Canon 7.

38. Viewing the lawyer's dilemma in a juvenile case as similar to that generally raised by legal practice, the ABA recommends that the attorney use the full arsenal of legal tools to protect the juvenile's legal rights and interests, tempered by the unique characteristics of the client. ABA COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY, INFORMAL ETHICS OPINIONS, No. 1160 (1971). *See In re* Alonzo C., 87 Cal. App. 3d 707, 151 Cal. Rptr. 192 (1978), for an example of a fact situation in which this kind of conflict arises. The child apparently had been sniffing paint, but the warrantless arrest and search were found invalid, resulting in a dismissal.

39. *In re* Ronald S., 69 Cal. App. 3d 869, 870, 138 Cal. Rptr. 387, 390 (1979) (discussing CAL. WELF. & INST. CODE § 601 (West 1972)); *cf.* OHIO REV. CODE §§ 2151.022(C) & (F) (Page 1976) (proscribing conduct in similar language).

40. *See* Finer, *Ineffective Assistance of Counsel*, 58 CORNELL L.Q. 1077, 1078 (1973).

41. Scott v. United States, 427 F.2d 609, 610 (D.C. Cir. 1970) (standard is whether "gross incompetence blotted out the essence of a substantial defense"); MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960), *cert. denied*, 368 U.S. 877 (1961) (whether counsel is "reasonably likely to render and [is] rendering reasonably effective assistance"); State v. Merchant, 10 Md. App. 545, 550–51, 271 A.2d 752, 755 (1970) ("whether under all the circumstances of the particular case the [defendant] was afforded genuine and effective representation"). For other standards, see Finer, *Ineffective Assistance of Counsel*, 58 CORNELL L.Q. 1077 (1973).

42. Note, *Parens Patriae and Statutory Vagueness in the Juvenile Court*, 82 YALE L.J. 745, 758–59 (1973).

43. Connally v. General Constr. Co., 269 U.S. 385, 391 (1926).

44. *See* Papachristou v. City of Jacksonville, 405 U.S. 156 (1972).

45. *Id.*

46. Giacco v. Pennsylvania, 382 U.S. 399 (1966).

whether juvenile proceedings are classified as civil or criminal for this analysis.

Vagueness attacks on status offense laws have not been well received by the courts. Although a number of cases have reached similar results,[47] two cases merit special attention. In *Commonwealth v. Brasher*[48] the Supreme Judicial Court of Massachusetts upheld a statute allowing "stubborn children, runaways, [and] common nightwalkers, . . . "[49] to be imprisoned or fined. The court set forth the elements of the crime of stubbornness as:

> (a) that a person having authority to give a child under the age of eighteen lawful and reasonable commands which such child is bound to obey gave such a command to a child; (b) that the child refused to submit to the command, and the refusal was stubborn in the sense that it was wilful, obstinate, and persistent for a period of time.[50]

In *E.S.G. v. State*[51] the Court of Civil Appeals of Texas upheld a statute defining a delinquent child as one who "habitually so deports himself as to injure or endanger the morals or health of himself or others."[52] The court said, "The relatively comprehensive word 'morals' is one which conveys concrete impressions to the ordinary person. Such a word is in constant use in popular parlance, and this word or words of similar import are used in the statutes of most States to define behavior illegal for a child."[53]

The decisions in *Brasher* and *E.S.G.* are justifiably attacked, not for their results but for the way the courts reached their conclusions. In each case the court held only that the words of the statutes were not impermissibly vague to the judges, even though it is unthinkable that statutes couched in such terms could apply validly to adults.[54] Such legal sleight-of-hand obscures the point implicitly made by those cases; due process for a juvenile is not the mirror

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47. United States v. Meyers, 143 F. Supp. 1 (D. Alaska 1956); People v. Deibert, 117 Cal. App. 2d 410, 256 P.2d 355 (1953); District of Columbia v. B.J.R., 332 A.2d 58 (D.C. App.), *cert. denied*, 421 U.S. 1016 (1975). *But see* Gesicki v. Oswald, 336 F. Supp. 371 (D.C.N.Y. 1971), *aff'd mem.*, 406 U.S. 913 (1972) (striking down New York's PINS statute as unconstitutionally vague); Gonzalez v. Mailliard, No. 50424 (N.D. Cal. 1971), *vacated and remanded*, 416 U.S. 918 (1974).

48. 359 Mass. 550, 270 N.E.2d 389 (1971).

49. MASS. ANN. LAWS ch. 272, § 53 (Michie/Law. Co-op 1980) is no longer applicable to stubborn children and runaways.

50. 359 Mass. 550, 555, 270 N.E.2d 389, 393 (1971).

51. 447 S.W.2d 225 (Tex. Civ. App. 1969), *cert. denied*, 398 U.S. 956 (1970).

52. TEX. REV. CIV. STAT. ANN. art. 2338–1, § 3(f) (Vernon 1971) (repealed 1980).

53. 447 S.W.2d 225, 226 (Tex. Civ. App. 1969). Referring to this paragraph, one commentator has said, "With all due respect, 'concrete impressions,' 'constant use in popular parlance,' and the fact that sister states employ equally vague statutes are subjective justifications of already subjective law. It is of no utility to use imprecision to justify an imprecise law." Roybal, *Void For Vagueness: State Statutes Proscribing Conduct Only for a Juvenile*, 1 PEPPERDINE L. REV. 1, 4 n.29 (1973).

54. The *E.S.G.* court cited no authority for its decision and, while not disagreeing with the argument in the dissent, the majority said simply, "[W]e disagree with [the dissent's] conclusion that [the statute] is unconstitutional." 447 S.W.2d 225, 226 (Tex. Civ. App. 1969). The facts in *E.S.G.* are compelling. The appellant, a 14-year old girl,

> was gone from her home for days at a time and lived with a girl reputed by appellant's mother to be a prostitute. Appellant and this girl hung around the Greyhound Bus Station and other public places. She was brought before the Juvenile Court after her mother had located her in a downtown transient

image of due process for an adult. The Supreme Court in both *Gault*[55] and *McKeiver v. Pennsylvania*[56] recognized this point, but many of the critics of status offense jurisdiction do not. Unless one is willing to contend that the juvenile system fails completely in its goal of prevention and treatment and that children, therefore, would be better served by treating them in the adult criminal system, the full panoply of adult due process rights simply cannot be applied to the juvenile system.

Status offenders and delinquents stand to lose much of their freedom when they appear before the juvenile court, and for this reason many of the due process rights developed for the adult system must be observed. The uncertainty of rights such as the vagueness defense, however, does not justify the elimination of status offense jurisdiction. In fact, elimination may exacerbate the problem. The most frequently suggested alternative to court jurisdiction is the assignment of the problem to a social service agency. But if, for example, a state were to assign the role of caring for runaways to a family service bureau, the problem of vague standards would be increased as agencies throughout the state developed their own standards. Courts at least are bound by the interpretations given statutes by higher courts; bureaucracies have no such direct checks on their daily functions. Allowing courts to define the boundaries of juvenile due process seems by far the better course.

3. *Equal Protection*

Some observers claim that status offense jurisdiction results in a violation of equal protection, either because children are treated differently from adults or because girls are often treated differently from boys.[57] Although the United States Supreme Court has never addressed the equal protection claims of status offenders, their claims may be analyzed in the following manner. The Court has traditionally categorized statutory classifications as (1) infringements of fundamental rights[58] or suspect classifications[59] or (2) other classifications. Statutes in the first category are subjected to "strict scrutiny," and will be upheld only if a "compelling state interest" is found, while those in the

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apartment with a young adult male. She had been gone from home for over a week on this occasion, and when apprehended by her mother and a policeman she was only partially dressed. . . . This case history illustrates the need for a provision such as found in Sec. 3(f) [the allegedly unconstitutional provision].

Id.

The dissent makes a well-reasoned argument based upon vagueness rules in adult cases. "Appellant here faces confinement for almost seven years. To insist on greater definiteness in a statute imposing a $5.00 fine than in one imposing such confinement as a sanction, . . . is to ignore reality." *Id.* at 228 (Cadena, J., dissenting). The dissent is perhaps most accurate when it frames the issue as where "the equilibrium between the individual's claim of freedom and society's demands upon him" is to be struck. *Id.* at 229. That the balance be struck in favor of the freedom of a 14-year old girl in E.S.G.'s situation is a difficult claim to make.

55. 387 U.S. 1 (1967).

56. 403 U.S. 528 (1970).

57. *See* Marks, *Juvenile Noncriminal Misbehavior and Equal Protection*, 13 FAM. L.Q. 461 (1980), for an excellent analysis of the equal protection arguments discussed *infra*.

58. *See, e.g.*, Skinner v. Oklahoma, 316 U.S. 535 (1974), striking down a law as an invasion of the fundamental right of privacy on equal protection grounds.

59. The term "suspect" was first used in Korematsu v. United States, 323 U.S. 214, 216 (1944).

second catagory are upheld if they have a "rational basis."[60] An intermediate level of scrutiny, sometimes called "strict rationality," has been applied in some circumstances, most notably, sex-based discrimination cases.[61]

The first step in the analysis is to determine whether the juvenile/adult classification impinges on a fundamental right or involves a suspect class, or whether it falls into other, more benign, categories. With respect to fundamental rights, children who have been adjudicated delinquent (or unruly in some states)[62] can be deprived of liberty. Since liberty is a fundamental right[63] guaranteed by the Constitution, a compelling state interest is required to uphold the classification.

Children also could be declared a suspect class. Although the characteristics of a suspect class are disputed, four basic requirements can be discerned. They are that (1) the characteristic be associated with political powerlessness,[64] (2) "the characteristic . . . have a history of official and private use for purposeful unequal treatment based on stereotypes about inherent ability or worth," (3) "the characteristic must be birth-determined," and (4) "the characteristic must be considered irrelevant to inherent ability or worth."[65] In arguing the case for juveniles as a suspect class, one commentator has said:

> It is [the] position of constant and virtually complete political powerlessness that is the most compelling reason for finding juveniles to be a suspect class. There are no juveniles in any legislature, court, or executive authority. They cannot vote. In these respects they are far less powerful than are blacks or women.[66]

Assuming that a fundamental right is involved or that children are found to be a suspect class, courts have had no trouble in finding a compelling state interest in protecting children to uphold the classification.[67] One author has persuasively explained the reasoning behind these decisions:

> It is abundantly clear that Americans insist that their children have *unequal* protection. Our local, state, and federal governments, our churches, United Ways and social groups are all replete with subsidized programs exclusively for children's

60. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 318–20 (1976) (Marshall, J., dissenting).

61. Califano v. Goldfarb, 430 U.S. 199 (1977); Craig v. Boren, 429 U.S. 190 (1976).

62. One estimate states that 45–55% of the more than 66,000 juveniles confined in state institutions are status offenders. M. REETOR, PINS: AN AMERICAN SCANDAL (1974), *cited in* STANDARDS, *supra* note 6, at 6. However, because many commentators tend to regard any form of residential placement, whether a group home, training school, or adult prison, as "institutionalization," these numbers are open to doubt.

63. *See* Korematsu v. United States, 323 U.S. 214 (1944), in which the Court upheld the World War II internment of Japanese-Americans by finding a compelling state interest. *See also* Marks, *Juvenile Noncriminal Misbehavior and Equal Protection*, 13 FAM. L.Q. 461, 470 (1980).

64. United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

65. Note, *Of Interests, Fundamental and Compelling: The Emerging Constitutional Balance*, 57 B.U.L. REV. 462, 474–75 (1977).

66. Marks, *Juvenile Noncriminal Misbehavior and Equal Protection*, 13 FAM. L.Q. 461, 481 (1980) (footnote omitted).

67. *See, e.g.*, Bykofsky v. Borough of Middletown, 401 F. Supp. 1242 (M.D. Pa. 1975), *aff'd mem.*, 535 F.2d 1245 (3d Cir.), *cert. denied*, 429 U.S. 964 (1976) (Marshall and Brennan, JJ., dissenting).

> needs. . . . Children have special needs to cope with infancy and adolescence; they need unequal protection.[68]

The argument that children *qua* children are denied equal protection of the laws thus has met with little success. The claim that status offense laws treat boys differently from girls, however, has been received more warmly, and courts have struck down status offense statutes that explicitly discriminated against girls. For example, a New York statute that allowed confinement of girls for status offenses until their eighteenth birthday, while allowing boys to be held only until their sixteenth birthday, was struck down in 1972.[69] At least in cases in which the discrimination is explicit, precedent exists for an equal protection argument.

Today, however, it is the implicit discriminatory effect of status offense laws that receives the most attention.[70] Girls are far more likely to be ensnared in the juvenile system on the basis of "sexual misconduct" or "endangering morals" sections[71] than are boys.[72] This effect has led one commentator, after discussing vagueness problems, to remark:

> The overbreadth and vagueness of the [status offense] statutes give rise to a situation ripe for discriminatory enforcement against female juveniles. By virtue of the nature of the American culture and its view of sex roles, the same behavior which goes unpunished in males may subject females to extended periods of confinement. The fact that the statutes create a great potential for discrimination and, in addition, unconstitutionally punish a status, should be enough to condemn them.[73]

This discriminatory enforcement of status offense laws is easily explained but difficult to defend. One writer has remarked that those making these claims "refuse to recognize that [discriminatory enforcement] might result from a parent's greater concern for her naive young daughter who is running loose than for her Tom Sawyer who is 'just being a boy.' "[74] To accept this explanation, one must accept as well that parental whims and wishes should be allowed to control the enforcement of laws. Further, even if one accepts this premise, it is hard to argue that the law should be used to

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68. Arthur, *Status Offenders Need a Court of Last Resort*, 57 B.U.L. REV. 631, 641 (1977). In an earlier article Judge Arthur wrote: "Should children be as equal as people? Certainly not. They should not have equal liberty; they should have less. Neither should they have equal protection—they should have more. How much less and how much more will depend on the maturity of the particular child at the particular time." Arthur, *Should Children Be as Equal as People?*, 45 N.D.L. REV. 204, 221 (1969) (footnote and emphasis omitted).

69. *In re* Patricia A., 39 N.Y.2d 83, 286 N.E.2d 432, 335 N.Y.S.2d 33 (1972). Similar statutes have been struck down on equal protection grounds. *See, e.g.*, People v. Ellis, 57 Ill. 2d 127, 311 N.E.2d 98 (1974) (based on a state equal rights amendment). *But see* State v. Mattiello, 4 Conn. Cir. Ct. 55, 225 A.2d 507 (App. Div.), *appeal denied*, 154 Conn. 737, 225 A.2d 201 (1966), *appeal dismissed*, 395 U.S. 209 (1969).

70. *See* Comment, *Juvenile Delinquency Laws: Juvenile Women and the Double Standard of Morality*, 19 U.C.L.A. L. REV. 313 (1971).

71. *See* OHIO REV. CODE ANN. § 2151.022(C) (Page 1979).

72. *See* STANDARDS, *supra* note 6, at 40.

73. Comment, *Juvenile Delinquency Laws: Juvenile Women and the Double Standard of Morality*, 19 U.C.L.A. L. REV. 313, 341 (1971).

74. Arthur, *Status Offenders Need a Court of Last Resort*, 57 B.U.L. REV. 631, 642 (1977).

institutionalize a double standard of morality. Double standards, however, are legion in our society, and although they may disappear from the letter of law, they will remain part of its application until they are forced out by constitutional interpretation.

C. *The Difference Between Status Offenders and Delinquents*

Implicit in the controversy surrounding status offenders is the notion that they are somehow different from their delinquent counterparts. Delinquents, having committed what would be a criminal offense, are assumed to be more dangerous and anti-social than a child who merely runs from home. But this assumption is specious in two respects. First, the psychological development and offense history of status offenders differ little from those of delinquents.[75] Second, some states allow a court to find a repeat status offender guilty of the delinquent offenses of probation violation or contempt of court and thereby "bootstrap" a status offender into a delinquent.[76] Thus, the legal distinction between status offenses and delinquency is made irrationally.

1. *The Non-Legal Distinctions Between Delinquents and Status Offenders*

Recent studies of children exposed to juvenile court have concluded that status offenders do not constitute a class recognizable either by offense history or by personality pattern. One study[77] analyzed the subsequent judicial contacts of over two thousand children who had appeared before two Virginia courts over a four year period. The researcher concluded:

> The findings of this [study] provide little or no support for those who have argued that status offenders are a distinctively different group of juveniles. To the contrary, with relatively minor exceptions, the findings indicate that many of those who appear [as status offenders] have previously appeared for quite different types of offenses and that those whose initial appearance involved a status offense frequently returned for other types of alleged misconduct.[78]

A second study analyzed the results of psychological tests administered to juveniles segregated into five groups based on adjudication (status offender or delinquent) and disposition (probation, group home placement, institutionalization).[79] The results showed that delinquents placed in a group home, institutionalized delinquents, and status offenders sent home on probation all showed "moderate rebellion and . . . anti-social acting out,"[80] while delinquents sent home on probation showed the least pathological adjustment.

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75. *See* notes 77–85 and accompanying text *infra*.

76. *See* notes 86–93 and accompanying text *infra*.

77. Thomas, *Are Status Offenders Really So Different?*, 22 CRIME & DELINQUENCY 438 (1976).

78. *Id.* at 454.

79. Marra and Sax, *Personality Patterns and Offense Histories of Status Offenders and Delinquents*, 29 JUV. AND FAM. COURT J. 27 (1978).

80. *Id.* at 29.

Surprisingly, the status offenders placed in group homes displayed the most deviant personalities. These results, it was concluded, "clearly [reflect] the large overlap between the personalities of adjudicated delinquents and [status offenders]."[81] The same researchers also focused on the offense histories of children in juvenile court. They concluded that status offenders were more likely to return to court than were delinquents, and when status offenders returned, they were "just as likely" to return for a delinquent act as those originally adjudicated delinquent.[82]

A third study measured the reliability of the commission of status offenses as an indication of subsequent delinquent behavior.[83] These researchers found that adolescents who engaged in status offenses also engaged in small theft (shoplifting) and in the use and sale of drugs but did not engage in more serious forms of delinquency. Further, status offenders and non-status offenders did not differ in their rate of serious delinquency.[84]

These studies paint a rather startling picture. Many status offenders seem to have more in common with relatively less serious delinquent offenders than with those who commit more serious delinquent acts. Conversely, status offenders who are removed from home are psychologically more similar to institutionalized delinquents than either status offenders or delinquents placed on probation. Finally, the high percentage of first-time status offenders who return on delinquency charges, coupled with the finding that status offenders who are removed from home display the most pathological development, indicates that many status offenders need more help than delinquents, not less.[85]

2. *The Blurry Legal Distinction Between Status Offenders and Delinquents*

In some jurisdictions a status offender who repeats an offense can be charged with the delinquent offenses of probation violation, contempt of court, or in the case of a status offender placed outside the home who subsequently runs away, escape.[86] Thus, a runaway who is returned home on

81. *Id.*

82. *Id.* at 30.

83. LeBlanc and Biron, *Status Offenses: Legal Term Without Meaning*, 17 J. RESEARCH CRIME AND DELINQUENCY 114 (1980).

84. *Id.* at 119, 121.

85. Of course, not all studies have found the status offender/delinquent dichotomy to be meaningless. *See, e.g.*, Clarke, *Status Offenders Are Different: A Comparison of Offender Careers by Type of First Known Offense*, 12 J. RESEARCH CRIME AND DELINQUENCY 51 (1975).

86. As of 1975, the state codes of California, Nevada, North Carolina, and Ohio were the only ones to allow a status offender to be ajudicated delinquent for violating a court order. Sarri, *Status Offenders: Their Fate in the Juvenile Justice System*, in STATUS OFFENDERS: AND THE JUVENILE JUSTICE SYSTEM—AN ANTHOLOGY 61,62 (Allinson ed. 1978). Two states retain these provisions. NEV. REV. STAT. § 62.040(c)(2) (1979); OHIO REV. CODE ANN. § 2151.02(B) (Page 1976). Since 1975, California and North Carolina have removed similar provisions from their codes. CAL. WELF. & INST. CODE § 602 (West Supp. 1981); N. C. GEN. STAT. § 7A-517(12) (Supp. 1979).

probation and later runs again can return to court on a delinquency charge even though he has committed the same act that originally was chargeable solely as a status offense.

In light of state statutory revisions providing for separate treatment of status offenders and delinquents, however, the trend is definitely against such "bootstrapping." For example, the use of contempt of court as a way to upgrade a status offender to a delinquent was recently disallowed in California.[87] While acknowledging that "[p]lacing a runaway in a nonsecure environment is something of an exercise in futility,"[88] the court found that the intent of the legislature in redrafting the juvenile code was to separate status offenders and delinquents.[89] In other states, similar juvenile code interpretations have disallowed a finding of delinquency for escape[90] and probation violation.[91]

Nevertheless, a few state courts have sanctioned bootstrapping in recent cases. For example, a North Carolina appeals court has indicated that probation violation could give rise to a delinquency charge,[92] and the Alaska Supreme Court has found that a chronic runaway was guilty of criminal contempt and therefore delinquent.[93] Thus, a basic philosophical inconsistency remains in the law of several state juvenile systems.

D. *Summary*

The problems discussed above are only the most severe and cause the most injustice and abuse within the juvenile system. Other commentators have pointed to additional ones: the fact that a criminal stigma attaches to all those going before the juvenile court regardless of the charge;[94] a perceived imposition on the family of the state's will and the resulting belief that the state unwarrantably intrudes into family life;[95] and the fact that the juvenile system is required at times to spend its limited resources on a child who is merely acting out instead of one deemed to really need the service.[96] Viewed

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87. *In re* Ronald S., 69 Cal. App. 3d 866, 138 Cal. Rptr. 387 (1977).

88. *Id.* at 872, 138 Cal. Rptr. at 391–92.

89. *See also* State *ex rel.* Bellanger, 357 So. 2d 634 (La. Ct. App. 1978), in which the court "reluctantly" disallowed using contempt as a basis for finding a violation of probation, based on a 1975 revision of the Louisiana juvenile code and the "fundamental principle that the punishment for contempt [cannot] exceed that given in the original hearing." *Id.* at 636. *In re* Baker, 71 Ill. 2d 480, 376 N.E.2d 1005 (1978), held that, under new Illinois law, a juvenile who runs from placement may be found in contempt, but that contempt may not be used as a basis for a delinquency adjudication.

90. *See* People *ex rel.* M.S., 73 N.J. 238, 374 A.2d 445 (1977); *In re* E.A.R., 548 S.W.2d 454 (Tex. Civ. App. 1977).

91. *See* People *ex rel.* D.R. v. E.R. and J.R., 29 Colo. App. 525, 487 P.2d 824 (1971).

92. *In re* Frye, 32 N.C. App. 384, 232 S.E.2d 301 (1977).

93. L.A.M. v. State, 547 P.2d 827 (Alaska 1976).

94. *See* Gough, *Beyond Control in the Juvenile Court*, in BEYOND CONTROL 271, 272 (L. Teitelbaum & A. Gough, eds. 1977); Orlando and Black, *Classification in Juvenile Court: The Delinquent Child and the Child in Need of Supervision*, JUV. JUST., May, 1974, at 13, 19 (1974).

95. STANDARDS, *supra* note 6, at 11–12. *Contra*, Gregory, *Juvenile Court Jurisdiction Over Noncriminal Misbehavior: The Argument Against Abolition*, 39 OHIO ST. L.J. 242, 263–67 (1978).

96. Quinn and Hutchinson, *Status Offenders Should be Removed from the Juvenile Court*, 7 PEPPERDINE L. REV. 923, 930–32 (1980).

as a whole, all these problems present a powerful indictment of the juvenile justice system's treatment of status offenders.

II. PROPOSALS FOR CHANGE

In response to these problems, many commentators have called for the abolition of status offense jurisdiction[97] or the abolition of the entire juvenile court system.[98] A proposal by the Institute of Judicial Administration and the American Bar Association, *Standards Relating to Noncriminal Misbehavior*,[99] is among those calling for the abolition of status offense jurisdiction.[100] To deal with the problems of runaways the commission proposed that the child be allowed to choose his own place of residence if he does not want to go home, so long as his choice does not "imperil" him and the placement is in a "suitable family setting."[101] The proposal almost totally ignores the parents' wishes; if the child and the parents cannot agree on placement, the child's wishes prevail unless the above conditions are not met.[102]

Under the proposal the court would no longer be allowed to compel attendance at school because truancy "is properly the business of the schools, not the courts."[103] To "promote" attendance, the *Standards* recommend educational counseling, alternative educational programs, "escort" services provided by the school or community, and "various programs involving the parents."[104] For children in conflict with their families, the *Standards* recommend a "broad spectrum of services"[105] that "should be offered on a voluntary basis, and the juvenile and the family should not be required to receive such services in cases involving the juvenile's unruly behavior which does not contravene the criminal law."[106]

A proposal by Saul Rubin,[107] published the year before the IJA/ABA Commission finished its tentative draft, also suggests elimination of status offense jurisdiction.[108] Rubin proposes that juvenile courts have jurisdiction over delinquents and over "any child who is in a situation subjecting him to

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97. Gough and Grilli, *Unruly Child and the Law*, JUV. JUST., Nov. 1972, at 9; Kaufman, *Of Juvenile Justice and Injustice*, 62 A.B.A.J. 730 (1976); Ketcham, *Why Jurisdiction Over Status Offenders Should Be Eliminated From Juvenile Courts*, 57 B.U.L. REV. 645 (1977); National Council on Crime and Delinquency, *Jurisdiction Over Status Offenders Should be Removed from the Juvenile Court—A Policy Statement*, 21 CRIME & DELINQUENCY 97 (1975).

98. *See, e.g.*, Guggenheim, *Abolishing the Juvenile Justice System*, TRIAL, Jan. 1979, at 23; McCarthy, *Should Juvenile Delinquency be Abolished?*, 23 CRIME & DELINQUENCY 196 (1977).

99. STANDARDS, *supra* note 6.

100. *Id.* § 1.1.

101. *Id.* §§ 5.1, 5.4(C)(2).

102. *Id.*

103. *Id.* § 1.1, at 38.

104. *Id.* § 1.1, at 39.

105. *Id.* § 4.1.

106. *Id.* § 4.2.

107. S. RUBIN, LAW OF JUVENILE JUSTICE (1976).

108. Rubin writes: "The result of giving jurisdiction over noncriminal behavior to the juvenile court is that a disproportionate share of available resources is applied to children who pose no criminal danger to society—while . . . many serious juvenile offenders are excluded from juvenile court jurisdiction or are transferred by the court to criminal court." *Id.* at 12.

serious physical harm, or who is in clear and present danger of suffering lasting or permanent damage."[109] However, his proposal is more vague than current court jurisdictional laws, and it is doubtful that the proposal would reach the goal of the elimination of status offenses. Courts easily could find that a status offender is "in clear and present danger of suffering lasting or permanent damage" if they so desired.

However, although both proposals are somewhat vulnerable to criticism, the philosophy behind them is not so easy to dismiss. Each proposal works from a particular view of the abilities and knowledge of the child. Rubin rejects the notion that the minor needs the doctrine of *parens patriae* to protect his every interest:

> The assumption of the common law, of all juvenile court law, of the [S]tandard [Juvenile Court] [A]ct of 1959, of parens patriae, is that children are incompetent and that their parents, and behind them the state or its agencies (such as schools, juvenile institutions, and welfare departments) should control them. The parallel assumption is that juvenile courts exist to enforce all this.[110]

The *Standards* echo this outlook:

> The juvenile court's jurisdiction over unruly children is bottomed on the assumption—most often implicit—that parents are reasonable persons seeking proper ends, that youthful independence is malign, that the social good requires judicial power to backstop parental command and that . . . coercive intervention will effectively remedy family-based problems and deter future offense.[111]

Indeed, it cannot be claimed that *all* children are incompetent, nor that all parents are reasonable persons. A status offender may be and often is acting out against unreasonable and inflexible parents or teachers who do not understand his needs or problems. When this occurs, however, effective help is required by the child or the family to prevent long-term damage to the child. Only a court, guided by due process and an overriding concern for the best interests of the child, can require that such help be made available to the child or family in a manner that is consistent and fair. Voluntary services have their place, and indeed are indispensible in a family service plan, but for those unable or unwilling to recognize their own problems, voluntary services are not enough. The solution to the juvenile justice problem, therefore, requires something other than elimination of status jurisdiction.

III. PROPOSED JURISDICTION

The following proposal proceeds on these premises. Most status offenders need help, and society needs to have its status offenders helped. Relinquishing jurisdiction over those children whose behavior becomes so unacceptable that parents or community feel that outside intervention is

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109. *Id.* at 44.
110. *Id.* at 36.
111. STANDARDS, *supra* note 6, at 3.

needed effectively abandons thousands of children and families with real and serious problems.

Coerced intervention might work; voluntary intervention often will not. When a family's situation becomes so intolerable that a child must run away, when school becomes so uninteresting that the child stops going, or when parents so lose control over their child that he does as he pleases without adult guidance, effective, wide-ranging help is required. Moreover, merely asking a child and parents to attend counseling seldom works; in most cases each party blames the other and does not recognize any fault in himself.

Most status offenders differ little from most delinquents except in the eyes of the law. A child who runs from home by hitchhiking to the next state differs little from the child who runs to the next county in his parents' car. A child who disrupts class by fighting or with violent outbursts of temper differs little from one who manifests his displeasure by throwing rocks through the windows. A child found intoxicated by glue and alcohol is in no better shape than one found intoxicated by shoplifted glue and alcohol. This is not to say that all of these children have the same problems or can be treated the same; to the contrary, each child is an individual who deserves special, individualized help. Labeling one a status offender and the other a delinquent does not, however, make the distinctions necessary to provide that help.

Coercive intervention in the lives of children does work.[112] Placing a troubled child in a group home and ordering him to stay there can have an enormously beneficial impact on that child. Getting a child out of the natural home can often buy the time needed for a child to realize his problems and get himself straightened out.

Juvenile court is the institution that should administer juvenile services. Juvenile court can act as a "traffic cop," directing children to the service suited to their needs with at least as much uniformity of standards as a nonjudicial agency, and it can compel the child's attendance at the service. Allowing a nonjudicial body to adjudicate and dispose of juvenile cases would multiply the problems of arbitrary standards and exacerbate the lack of procedural safeguards.

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112. *See* R. MOSELEY, KNOCK ON OUR DOOR 5, 11–12 (1979):

> Since we opened in 1968, we have been "Mom," "Dad," and "Sister" to 164 girls, and while our record isn't perfect, nearly eight out of ten have made their way in the world without continuing their life sentence on the installment plan in our expensive and often damaging penal system.
>
> . . . .
>
> We don't always suceed with our girls. Even when we are selective—and interview candidates to make sure they want to come to [the group home] and will benefit by our program—we sometimes fail. Ours is not a panacea that will salvage every girl who is troubled or in trouble. But of those who come to us nearly [80%] grow up to lead useful, productive, crime-free lives. They find jobs, marry, raise children and come back to visit us, some after they have been on their own for ten years. No matter how challenging some days are, the calls, letters, and visits we get from our girls who have grown up and are succeeding make it all worthwhile.

It is proposed that jurisdiction statutes be rewritten in pertinent part in the following manner:

> Section I. Juvenile Court Jurisdiction. The juvenile court has exclusive original jurisdiction in cases concerning any child alleged to be a child in need of treatment, an abused child, a neglected child, or a dependent child. A child in need of treatment is any child who
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> (A) either (1) violates any law of this state, the United States, or any ordinance or regulation of a political subdivision of the state, which would be a crime if committed by an adult; (2) is habitually truant from school or home without his/her parents' permission; or (3) does not subject himself/herself to the reasonable control of his/her parents, teachers, custodian, or guardian by reason of being habitually disobedient; and
>
> (B) is found by the court to be in need of the rehabilitative resources of the juvenile court.
>
> Section II. Disposition of a Child in Need of Treatment. If the child is found to be a child in need of treatment, the court may make any of the following orders of disposition:
>
> (A) return the child home subject to whatever conditions or limitations the court may prescribe;
>
> (B) place the child on probation subject to whatever conditions or limitations the court may prescribe;
>
> (C) require the child to attend counseling, or make use of other helping services available in the community;
>
> (D) place the child in the temporary or permanent custody of a non-secure home, camp, school, or other such residential facility;
>
> (E) commit the child to a secure facility operated by [the state division of youth], but only if the court makes an independent finding that (1) other dispositional options will not be suitable for the child's needs and problems, and (2) the child is so dangerous that he/she must be isolated from the community for his/her own protection or the protection of the community; or
>
> (F) make such further dispositions as the court finds proper, so long as the child is not placed in a secure residential facility.

The effects and characteristics of this proposal are as follows. Due process safeguards, as defined by the United States Supreme Court for the juvenile court, will be imposed on all hearings for children alleged to be in need of treatment, because in each case the child may be deprived of liberty by placement outside the home.

The artificial status offender/delinquent dichotomy is erased, and is replaced by a more meaningful less-serious offender/serious offender distinction. In effect, this system would separate those coming before the juvenile court into three groups: those not requiring intervention (that is, those not found to be in need of the rehabilitative resources of the juvenile court), those requiring a relatively low level of intervention, and those requiring separation from the community. The first group would contain those juveniles whose actions should be characterized as childish acting out devoid of any substantial signs of serious long-range problems. This change would remove from the system those children whose actions, though possibly destructive or antisocial, do not warrant the court's spending its limited resources on them.

Thus, the actions of some children who engage in minor vandalism, skip school once or twice, or break curfew occasionally would be viewed as the price society pays for youthful independence.

The second group, those requiring help but not segregation, would comprise the bulk of cases before the court and thus would be afforded the widest range of dispositional alternatives. Whatever is required for the child's needs and within the means of the court, from probation to removal from the community by placement in a non-secure residential facility, would be made available.

The third group, those whose acts are so dangerous that the community needs to be protected from them, is the only one that could be placed in a secure facility. Children could not be placed there to punish them for running from a prior placement or because there is no place else to put them. By definition, a child who is solely a chronic runaway or school truant will never be institutionalized because those acts can never be so dangerous that society needs to be protected from the child. Further, the dangerous child will be kept out of placements with less seriously troubled children, thus avoiding the problem of group homes becoming "crime schools" and allowing non-secure facilities to function properly.

This proposal allows the maximum possible degree of diversion. It recognizes that help that is voluntarily sought is better than no help but also that help which is imposed often is better than no help at all. Thus, if a child can be diverted into non-coercive treatment, by definition he will not be brought into the system because he will not be "in need of the rehabilitative resources of the juvenile court."[113] Juvenile courts already divert a majority of the children coming before them,[114] and only those who cannot be helped in any other way should be within the ambit of the courts' coercive power.

This proposal reconciles to an extent the condition-oriented philosophy of the juvenile court with the procedural safeguards of the adult criminal court. Every child will be afforded the procedural safeguards currently required solely in delinquency proceedings. The attorney representing a child charged with what was a status offense is given a more important and better-

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113. The "need of treatment" requirement, while seemingly innocuous, is a statutory requirement in only a few states and a judicial requirement in others. *See* Jones v. Commonwealth, 185 Va. 335, 343, 38 S.E.2d 444, 447 (1946):

> To classify an infant as delinquent because of a youthful prank, or for a mere single violation of a misdemeanor statute or municipal ordinance, not immoral per se, . . . is offensive to our sense of justice and to the intendment of the law. We cannot reconcile ourselves to the thought that the incautious violation of a motor vehicle traffic law, a single act of truancy, or a departure from an established rule of similar slight gravity is sufficient to justify the classification of the offender as a "delinquent". . . .

See also M.S.K. v. State, 131 Ga. App. 1, 205 S.E.2d 59 (1974); Young v. State, 120 Ga. App. 605, 171 S.E.2d 756 (1969); *In re* David W., 28 N.Y.2d 589, 268 N.E.2d 642, 319 N.Y.S.2d 845 (1971); UNIFORM JUVENILE COURT ACT §§ 2(3), 29(b).

114. *See* PRESIDENT'S COMMISSION OF LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 9–16 (1967). Three major methods of diversion are used: police station adjustment, planned diversion to other social agencies, and unofficial court handling of cases. *See* Arthur, *Status Offenders Need a Court of Last Resort*, 57 B.U.L. REV. 631, 632 (1977).

defined role since the state must prove not only that the child is "habitually" disobedient or truant but also that the child is in need of treatment. The proposal is relatively specific, yet it encompasses most types of behavior that the juvenile court seeks to control. Sexual conduct by girls still may result in sanctions when none are imposed on boys, but this is more a function of the administration of the law than of the substantive content of the law itself.

IV. CONCLUSION

While not a radical change in the present structure, the proposed restructuring of the juvenile court's jurisdiction is calculated to redress, at least partially, the problems of status offense jurisdiction. Although "unruly child cases are usually among the most intractable and difficult matters with which the juvenile court has to deal,"[115] it also must be understood that the problems of the status offender can lead to a lifetime of other, more serious problems if not addressed promptly and effectively.[116] This proposed change in the jurisdiction of the juvenile court, coupled with effective dispositional alternatives, represents one way in which the law can help the status offender.

Kurt Erlenbach

115. STANDARDS, *supra* note 6, at 4.

116. *See* STANDARDS, *supra* note 6, at 3–4: "Most defiance of parents and other forms of noncriminal misbehavior—troublesome though they are—represent a youthful push for independence and are both endemic and transitory. They are at worst transitional deviance that is outgrown." Whether the authors of the STANDARDS would consider the problems of E.S.G., *supra* note 54, to be a "youthful push for independence" is unknown.